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All Cases Matter: Mitigating Bias in the Administrative Law Judiciary

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All Cases Matter: Mitigating Bias in the Administrative Law Judiciary

By The Honorable Cherron Payne*

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INTRODUCTION

Imagine sitting in a courtroom or tribunal, filled with trepidation, because your freedom, livelihood, or well-being are at stake. While hoping that the evidence will positively support your position, and the correct application of law will bolster your case, you peer at the jury and notice there is no one who looks like you or could represent or understand your interests. You also realize that you are being ignored by your attorney and patronized by the judge due to your gender, race, socioeconomic status, religion, sexual orientation, ethnicity, nationality, or other social categorization. As you conceptualize the reality of your surroundings, you start to ponder whether justice is real or just a cliché used to peripherally describe legal proceedings. At this juncture, you look to the judge as the last chance for fairness, because you know that judges are charged with administering impartiality and behaving as paragons of justice. However, you realize that your interests are being dismissed by the judge as well. This epiphany reveals to you that justice may not always be blind, and impartiality and fairness are not always distributed due to explicit or implicit bias.

Judges, as architects of justice, are constitutionally ordained¹ and ethically bound to conduct fair and impartial hearings to ensure the administration of justice. Rule 2.2 of the Model

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Code of Judicial Conduct mandates, “[a] judge shall perform the duties of judicial office impartially, competently, and diligently.”² Thus, judges must identify and eradicate obstacles or judicial barriers that may inhibit the administration of justice to litigants. However, bias in juridical proceedings threatens the distribution of justice because it breaches judicial impartiality and impedes fairness. Pursuant to Rule 2.3 of the Model Code of Judicial Conduct,³ “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”⁴

Bias, a partiality in favor of or against a group of people, compromises the integrity of judicial proceedings and remains a concern for the judiciary and the public it serves.⁵ Although literature previously documents the exhibition of bias⁶ in the courts,⁷ there is a literature gap

¹ Administrative law judges are differentiated from Article III judges but are still deemed to be part of the judiciary. James Moliterno, *The Administrative Judiciary’s Independence Myth*, 27 NAT’L ASS’N ADMIN. L. JUDICIARY 53, 61 (2007).

² MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS’N 2020).

³ The state administrative law judiciary’s adherence to the Model Code of Judicial Conduct varies. This statement was supported at the 2022 annual conference of the National Association of Administrative Law Judiciary during a presentation on judicial conduct. Hon. Emily Chafa (Ret.), State of Iowa, and Hon. Julian Mann (Ret.), State of North Carolina, Presentation “ALJ Conduct On and Off the Bench.” at the 2022 Annual Conference of the National Association of Administrative Law Judiciary (October 24, 2022). Some state administrative law judges must adhere to all or part of the Model Code of Judicial Conduct, but in other states, administrative law judges are only bound by the code of conduct for state employees. *Id.* In other jurisdictions, states have developed their own code of conduct for administrative law judges. MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2020).

⁴ *Id.*

⁵ See generally David Faigman, Jerry Kang, Mark Bennet, Devon Carbado, Pamela Casey, Nilanjana Dasgupta, Rachel Godsil, Anthony Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

⁶ Pamela Casey, Roger Warren, Fred Cheesman & Jennifer Elek, *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 64–65 (2013).

⁷ Faigman et. al., *supra* note 5, at page 1127. See also Natalie Daumeyer, Ivuoma Onyeador, Xanni Brown & Jennifer Richeson, *Consequences of Attributing Discrimination to Implicit vs. Explicit Bias*, 84 J. SOC. PSYCHOL. 1 (2019).

regarding how bias specifically affects the administrative law judiciary. Within the administrative law judiciary, bias is a concern because administrative tribunals are often afforded fewer resources than judges within the judicial branch, creating the potential for increased bias due to resource needs and safety concerns.⁸ The administrative law judiciary must also be cognizant of bias because decisions are made solely by the administrative law judge; there is often no jury to counterbalance possible biases.⁹ Moreover, as an adjudicatory alternative to the courts, administrative tribunals may attract a substantial population of pro se parties; thus, increasing the diversity of the population it serves.¹⁰ As a result, there is a concrete need for the administrative law judiciary to comprehend, examine, and mitigate bias as a mode of counteracting partiality in tribunal proceedings.

Part II of this article explores the issue of bias and the underlying factors that configure bias, such as attitude, stereotype, and prejudice. Part II also examines the two principal types of bias, explicit bias and implicit bias, and defines common subsets of bias, such as gender bias. Part III presents implicit bias as an unconscious, utilitarian, and neuroscientific mechanism. Part III examines the neuroscience of decision-making and the neural structures that influence and regulate decision-making processes. Part III also discusses emotion as an underpinning to decision-making and the role of emotion in implicit bias. Furthermore, the amygdala in the brain will be examined regarding its critical role in mediating emotion, fear, and the generation of implicit bias. Part IV

⁸ Faigman et. al., *supra* note 5, at 1127. See also Cherron Payne, *Judging Justice: The Safety and Operational Impact of Reduced Funding to the Judiciary and Its Effect on the Administration of Justice*, PROQUEST, (June 25, 2019) <https://www.proquest.com/openview/98cc2e8a732ae00a741913bac49e9414/1.pdf?pq-origsite=gscholar&cbl=18750&diss=y>.

⁹ See generally Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N. ADMIN. L. JUDICIARY 97, page (2007).

¹⁰ *Id.*

discusses the individualized or personal factors that influence bias. This section also illustrates systematic factors that may elicit bias, such as diminished resources in administrative tribunals. Part V addresses the administrative law judiciary’s susceptibility to bias due to systemic factors, such as resource allocation. This section also discusses the typical resource allocation in the administrative law judiciary and how diminished resources affect decision-making and fuel bias. Section V also presents a Connecticut case study examining the lived experiences of judges as an empirical basis to support the nexus between resource allocation and bias. Part VI introduces the 4-D deflate, debias, defend, and data approach as a paradigm for mitigating bias, along with a description of practical methods of mitigating bias in the judiciary. Part VII concludes this article by underscoring the need for bias mitigation and impartial administrative hearings.

I. BIAS

Bias is a mental construct that generates an attitude, stereotype, or prejudice toward a social category or group that often results in partiality or unfairness.¹¹ An attitude is defined as an association between a social group “and an evaluative valence, either positive or negative.”¹² A stereotype is an association between a social group and a trait.¹³ A prejudice is a negative feeling toward a social group or category that is undergirded by either an attitude or stereotype.¹⁴ Although stereotypes and attitudes are interlinked, literature suggests that a distinction should be demarcated between the two constructs because a positive attitude toward a person does not

¹¹ Faigman, *supra* note 5, at page 1127.

¹² *Id.* at 1128–29.

¹³ *Id.*

¹⁴ Chloe Fitzgerald, Angela Martin, Delphine Berner & Samia Hurst, *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, BMC PSYCH. 7, 29 (2019), <https://doi.org/10.1186/s40359-019-0299-7>.

eliminate negative stereotypes toward that person.¹⁵ Conversely, there may be a positive stereotype toward a person, but a negative attitude toward that same person. For example, a person may form a positive stereotype, such as excelling academically, about a social group, but have a negative attitude toward that same group.¹⁶

Bias presents itself in attitudes and stereotypes about specific social categories, such as gender or nationality.¹⁷ While there are different manifestations of bias, scientific studies have revealed that different forms of bias yield the same discriminatory upshot.¹⁸ For example, Yale University researchers conducted a study concerning physicians' age bias in patient care.¹⁹ The result of the physicians' age bias rendered a discriminatory effect; the physicians spent less time with older patients and exhibited more dismissive behavior toward them.²⁰ During the study, some physicians were aware of their ageism, while some were unaware.²¹ The doctors who were aware of their bias displayed explicit bias, and the physicians who were unaware of their ageism exhibited implicit bias.²² Whether explicit or implicit, the upshot of the physicians' bias was discrimination.²³

¹⁵ Faigman, *supra* note 5, at 1128-29.

¹⁶ *Id.*

¹⁷ *Id.* at 1128.

¹⁸ See Natalie M. Daumeyer, Ivuoma N. Onyeador, Xanni Brown & Jennifer A. Richeson, *Consequences of Attributing Discrimination to Implicit vs. Explicit Bias*, 84 J. EXPERIMENTAL SOC. PSYCH. 1, 3 (2019), https://spcl.yale.edu/sites/default/files/files/Daumeyer_etal2019JESP.pdf.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

A. EXPLICIT BIAS

Explicit bias is a conscious, intentional form of bias.²⁴ Explicit bias involves performing outwardly biased acts, ranging from spewing insults to withholding civil rights from an individual or social group.²⁵ While there should never be explicit bias within a tribunal or courtroom, there is a historical catalog of U.S. legal cases where such explicit bias plagued juridical proceedings and breached justice.²⁶

A historical example of an explicit bias in the judiciary and the legal system is a collection of cases that occurred in Scottsboro, Alabama in 1931.²⁷ On March 25, 1931, nine black teenagers were traveling on a freight train²⁸ when it reached a stop in Paint Rock, Alabama.²⁹ At this stop, two white females, who were also riding the train, were facing charges of vagrancy and illegal sexual activity. To thwart these charges, they falsely accused the nine black teenagers of rape.³⁰

²⁴ *Id.* at 1.

²⁵ *Id.* at 1.

²⁶ See e.g., *The Scottsboro Boys*, NAT'L MUSEUM OF AFR. AM. HISTORY & CULTURE, <https://nmaahc.si.edu/explore/stories/scottsboro-boys> (last visited Jan. 26, 2023).

²⁷ *Who Were the Scottsboro Boys?*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/scottsboro-boys-who-were-the-boys/> (last visited March 27, 2023). The initial cases involved the State of Alabama against nine black defendants: Olen Montgomery, Clarence Norris, Haywood Patterson, Ozie Powell, Willie Robertson, Andrew Wright, Eugene Williams, Charles Weems, and Leroy Wright. *Id.*

²⁸ A racially induced brawl erupted between a group of black teenagers and a group of young white men while riding the train. Citation. The white men were asked to exit the train. Citation. At a train stop in Paint Rock, Alabama, an angry mob confronted the black teenagers. The teenagers were charged with assault because the white males were forced to exit the train prior to the stop. *Id.*

²⁹ *Id.*

³⁰ *Id.*

The rape trial occurred in Scottsboro, Alabama, and the defendants were called the “Scottsboro Boys.”³¹ During this trial, there were several miscarriages of justice including ineffective assistance of counsel, due process violations, and explicit bias throughout the prosecution of the cases and retrials.³² Within the legal system, explicit bias is exhibited through the denial of fundamental rights as set forth in the Sixth Amendment of the Constitution. Judges, lawyers, and the legal community are aware of a defendant’s right to counsel, right to a fair trial, and right to an impartial jury as outlined by the Sixth Amendment. Outwardly denying a marginalized group the benefit of counsel, a speedy trial, and an impartial jury, just because they are black, is indicative of explicit bias. In the Scottsboro Boys cases, the belief that young black teenagers, due to their race and age, did not deserve effective assistance of counsel or a jury of their peers, permitted and justified the denial of such rights.³³ Moreover, in the Scottsboro cases, the prosecution relied on the assumed prejudice of the jurors by presenting the defendants in a negative light while also depicting the defense counsel for the Scottsboro Boys negatively.³⁴ The prosecution argued that the defense counsel, Samuel Leibowitz, was untrustworthy because he was Jewish and an outsider because of his northern roots.³⁵ Attorney Leibowitz risked his life defending the Scottsboro Boys but was incensed by the shameful injustice impacting the trials.³⁶

³¹ *Id.*

³² *The Scottsboro Boys*, *supra* note 26.

³³ *Id.*

³⁴ *Defender Of Scottsboro Boys – Samuel Leibowitz*, ACCIDENTAL TALMUDIST, <https://www.accidentaltalmudist.org/heroes/2016/11/24/the-lawyer-who-defended-the-scottsboro-boys/> (last visited Jan. 26, 2023).

³⁵ *Id.*

³⁶ *Id.*

In 1930s Alabama, segregation was legal, and explicit bias was customary.³⁷ Segregation and discrimination were often funneled into courtrooms and tribunals.³⁸ Influenced by the sociopolitical and segregationist practices of 1930s Alabama, some judges permitted explicit biases which tainted trials and impugned adjudication.³⁹ Because 1930s Alabama was wrought with segregation and abridgement of human rights for black people, explicit biases were permitted and applied during prosecution, throughout juridical proceedings, and during the adjudicatory process.⁴⁰

Because of the sociopolitical climate in the 1930s, some judges during that time period were penalized for attempting to eliminate explicit biases during the trial and the adjudicatory process.⁴¹ For instance, Judge James Horton, who initially presided over some of the Scottsboro cases, postponed the remainder of trials to determine whether a fair trial was possible.⁴² He also ordered a trial de novo for Haywood Patterson, one of the Scottsboro Boys.⁴³ Judge Horton granted Patterson a new trial because he questioned the credibility of witness testimony and did not believe the evidence supported the original conviction of Haywood Patterson.⁴⁴ Judge Horton stated:

History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *A Miscarriage of Justice: The True Story of the Scottsboro Boys*, SIGNATURE, <https://www.sigtheatre.org/scottsboro/a-miscarriage-of-justice/> (last visited Nov. 23, 2022).

⁴² *Id.*

⁴³ *Judge Horton Orders a New Trial in the Case of Haywood Patterson*, FAMOUS TRIALS, <https://www.famous-trials.com/scottsboroboy/1549-hortonorders> (last visited Mar. 27, 2022).

⁴⁴ *Id.*

both of rape and of insult upon the slightest provocation for ulterior purposes. These women are shown, by the great weight of the evidence, on this very day before leaving Chattanooga, to have falsely accused two negroes of insulting them, and of almost precipitating a fight between one of the white boys they were in company with and these two negroes. This tendency on the part of the women shows that they are predisposed to make false accusations upon any occasion whereby their selfish ends may be gained.⁴⁵

As a result of his actions, Judge Horton was defeated a year later for reelection.⁴⁶

Although Haywood Patterson was granted a new trial, the retrial was laden with explicitly biased behavior, especially from Judge William Callahan,⁴⁷ the judge assigned to Patterson's new trial.⁴⁸ At this juncture, blacks were now required to sit on juries, but Judge Callahan did not allow prospective black jurors to sit in the jury box.⁴⁹ Judge Callahan seamlessly allowed every objection from the prosecutor, truncated all the defense's testimony, and struck testimony that did not align with his viewpoint.⁵⁰ Judge Callahan even encouraged the jurors to convict by invoking fear in the jury and using racial epithets to describe the defendants as lascivious rapists.⁵¹ The jury delivered a guilty verdict coupled with a sentence of death.⁵²

⁴⁵ *Id.*

⁴⁶ *A Miscarriage of Justice: The True Story of the Scottsboro Boys*, *supra* note 44.

⁴⁷ William Callahan was seventy-seven years old and had never attended law school when assigned to this case. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

However, there were challenges to the Scottsboro cases, as documented in *Powell v. Alabama*, *Norris v. Alabama*, and *Patterson v. Alabama*.⁵³ In *Powell v. Alabama*, the Supreme Court held that the defendants were denied a fair trial due to the ineffective assistance of counsel, which was a violation of the Due Process Clause of the Fourteenth Amendment.⁵⁴ In *Norris v. Alabama*, the Supreme Court held that defendant, Clarence Norris, had been denied his Fourteenth Amendment right to equal protection due to the exclusion of blacks on juries.⁵⁵ In *Patterson v. Alabama*, the Supreme Court held that a black defendant is denied due process if other blacks are excluded from the jury.⁵⁶ Chief Justice Hughes, who delivered the majority opinion in *Patterson*, articulated a critical point regarding justice and the need to rectify misapplications of law to ensure justice.⁵⁷ Justice Hughes stated:

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition on the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act.⁵⁸

However, explicit bias is not an issue that remains within the historical context; it still adversely clouds one's perceptions. As the Scottsboro Boys cases were ravaged with injustice

⁵³ *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935); *Patterson v. Alabama*, 294 U.S. 600, 601 (1935).

⁵⁴ *See generally Powell v. Alabama*, 287 U.S. 45 (1932).

⁵⁵ *See generally Norris v. Alabama*, 294 U.S. 587 (1935).

⁵⁶ *Patterson v. Alabama*, 294 U.S. 600, 601 (1935).

⁵⁷ *Id.* at 607.

⁵⁸ *Id.*

rooted in explicit biases concerning black males, those biases are still present and judges must be cognizant of such biases. President Obama once declared, “[i]f we’re honest with ourselves, because of the history of our country, and because of the images we receive as we’re growing up etcetera—oftentimes there’s a presumption that Black men are dangerous. And so, that has to be worked through.”⁵⁹ Bias about targeted racial and social groups must also be worked through to counteract impartiality and ensure fairness from the bench or in the tribunal.

B. IMPLICIT BIAS

Implicit bias is an unconscious, unintentional form of bias.⁶⁰ Implicit bias is akin to implicit social cognition, which is the psychological study of social judgments that are made without conscious awareness or control.⁶¹ While unintentional, implicit bias may be a precursor to explicit bias if there is a lack of cognizance and a failure to mitigate. Implicit bias is often comprised of negative perceptions and often yields negative consequences.⁶² However, implicit bias can be manifested as a positive bias, meaning that an individual forms a positive judgment about someone that is rooted within stereotype.⁶³ Whether positive or negative, implicit biases are unconscious influences that may breach the impartiality of a judge’s adjudication. An implicit bias that is negative yields partiality and an adverse impact; whereas a positive bias also yields

⁵⁹ Melissa Little, *Implicit Bias: Be an Advocate for Change*, ABA (Jun. 27, 2018), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/implicit-bias-be-an-advocate-for-change/.

⁶⁰ *Id.*

⁶¹ Faigman et. al., supra note 5. See generally Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007).

⁶² Faigman et. a., supra note 5.

⁶³ Fabiana Silva, *What Predicts Employer Discrimination? The Role of Implicit and Explicit Racial Attitudes*, NAT’L CENTER FOR BIOTECHONOLGY INFORMATION, 108 Soc. Sci. Res. (Aug. 26, 2022).

partiality and may render an adverse impact because there may be another individual or group who has been slighted due to positive bias.⁶⁴ Literature also supports the notion of positive bias. “[W]e often go with our gut, which often means preferring people we like (warmth) or seem to be like us (ingroup favoritism) then rationalize a post hoc explanation to justify that decision.”⁶⁵

In a study of implicit and explicit attitudes involved in employer discrimination, both negative and positive biases were used during the hiring process.⁶⁶ The study discovered that black employees were hired less, but not due to direct disdain against black employees.⁶⁷ Black employees were hired less because there was a preference, or a positive bias, toward white candidates.⁶⁸

While implicit bias is typically administered to underrepresented social groups, minorities, or indigent parties, there may also be bias, positive or negative, directed toward social groups that are non-minority or are privileged.⁶⁹ For instance, a judge may exhibit socioeconomic bias against a party who is indigent,⁷⁰ but socioeconomic bias can also be applied toward a person who is wealthy.⁷¹ For example, a judge may perceive an indigent litigant as uneducated or unsophisticated and lacking credibility.⁷² Conversely, a judge may perceive a wealthy litigant as

⁶⁴ *Id.*

⁶⁵ Jerry Kang, *What Judges Can Do About Implicit Bias*, 57 CT. REV. 78 (2021).

⁶⁶ Silva, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

⁷¹ Kang, *supra* note 68.

⁷² *See generally* Faigman et. al., *supra* note 5.

educated and sophisticated, thus finding them more credible.⁷³ A judge may also perceive a wealthy litigant as privileged or entitled and may judge them more harshly due to the presumed privilege.⁷⁴

There are specific forms of bias toward social groups that are commonly applied, even in tribunals.⁷⁵ While there are many forms of bias, the figure below lists and describes some of the most common forms of bias exhibited in courtrooms and tribunals:

TYPE OF BIAS	DESCRIPTION
Gender Bias	Bias exhibited toward a person due to gender. ⁷⁶ For example, a male may be biased toward a female or toward another male. ⁷⁷ A female may be biased toward another female or toward a male. ⁷⁸ The gender of the person who is exhibiting bias is not the key issue; it is the fact that there may be biased treatment toward a person solely based on gender. ⁷⁹
Racial Bias	Bias exhibited toward a person due to their race. ⁸⁰ A non-minority may be biased against a racial minority, or a racial minority may be

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Hidden Injustice: Bias on the Bench*, A.B.A DIVERSITY AND INCLUSION 360 COMMISSION, (Apr. 11, 2016), <https://www.americanbar.org/news/abanews/aba-news-archives/2016/04/hidden-injustice--bias-on-the-bench/>.

⁷⁶ *Implicit Bias*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (July 31, 2019), <https://plato.stanford.edu/entries/implicit-bias/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

	biased against a non-minority or even a person of the same race. ⁸¹
Socioeconomic Bias	Bias exhibited toward a person due to socioeconomic status, such as a litigant who is indigent, middle class, or wealthy. ⁸²
Sexual Orientation Bias	Bias exhibited toward members of the LGBTQIA community. ⁸³ Sexual orientation bias may also be directed toward heterosexual or non-LGBTQIA individuals. ⁸⁴
Religious Bias	Bias exhibited toward people of a specific religion, spiritual practice, or denomination. ⁸⁵ Religious bias may also be manifested toward individuals who do not prescribe to a specific religion or are atheist or agnostic. ⁸⁶
Nationality Bias	Bias exhibited toward people of a certain nationality. ⁸⁷ This type of bias is often endured by immigrants. ⁸⁸
Ethnic Bias	Bias exhibited toward people of a certain ethnicity. ⁸⁹ This type of bias is often endured by immigrants and racial minorities. ⁹⁰
Age Bias	Bias exhibited toward people based on their age. Although age bias is more typically

⁸¹ *Id.*

⁸² Neitz, *supra* note 73.

⁸³ STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 79.

⁸⁴ Melanie Morrison & Todd Morrison, *Sexual Orientation Bias Toward Gay Men & Lesbian Women: Modern Homonegative Attitudes & Their Association with Discriminatory Behavioral Intentions*, 41 J. AAPL. SOC. PSYCH. 2573 (2011).

⁸⁵ *Hidden Injustice: Bias on the Bench*, *supra* note 78.

⁸⁶ *Id.*

⁸⁷ Natalie Daumeyer, Ivuoma Onyeador, Xanni Brown, Jennifer Richeson, *Consequences of Attributing Discrimination to Implicit vs. Explicit Bias*, J. OF SOC. PSYCHOL. 84 (2019), https://spcl.yale.edu/sites/default/files/files/Daumeyer_etal2019JESP.pdf.

⁸⁸ *Id.*

⁸⁹ Daumeyer et. al., *supra* note 90.

⁹⁰ *Id.*

	experienced by older individuals, there can be age bias toward youth. ⁹¹
Political Bias	Bias exhibited toward people of a certain political affiliation or political party. ⁹²

As discussed, a history of cases depicts explicit biases fueling unfair trials and the denial of rights.⁹³ While the Scottsboro Boys cases provide a historical backdrop to explicit bias in legal proceedings, more recent cases suggest the prevalence of implicit biases. In *Masterpiece Cake Shop, v. Colorado Civil Rights Commission*, a cake shop owner refused to prepare and design a cake for a same-sex couple, claiming it contradicted his religious beliefs.⁹⁴ The administrative law judge in the initial case ruled in favor of the same-sex couple.⁹⁵ The Supreme Court reversed, ruling that designing a cake for a same-sex couple violates the cake-shop owner’s First Amendment right to freedom of religious expression.⁹⁶ Specifically, Justice Thomas declared, “[t]he First Amendment gives individuals the right to disagree about the correctness of Obergefell⁹⁷ and the morality of same-sex marriage.”⁹⁸ *Masterpiece Cake Shop*

⁹¹ *Id.*

⁹² Eric Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform*, U. OF CHI. L. REV. 853 (2008), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/75_2_Posner.pdf.

⁹³ *Infra* Part II.

⁹⁴ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723 (2018).

⁹⁵ *Id.*

⁹⁶ *Id.* at 14.

⁹⁷ In *Obergefell v. Hodges*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment recognizes marriage as a fundamental right, which includes that of same-sex couples. Citation The holding of *Obergefell* required states to legally recognize and license marriages of same-sex couples. *Obergefell v. Hodges*, 576 U.S. 644 (2018).

⁹⁸ *Id.* at 14.

sets forth issues concerning sexual orientation and religion.⁹⁹ Thus, sexual orientation bias and religious bias are two implicit biases that may have been triggered during the processing of this case and on various adjudicatory levels.

The United States border crisis is also an issue that may invoke implicit biases, such as nationality bias, toward immigrants. Due to this crisis, there have been recent legal challenges to the policies concerning migrants crossing the border into the United States.¹⁰⁰ On November 15, 2022, a federal court order stayed a ruling to strike the Title 42 immigration policy, which allows U.S. authorities to expel immigrants who cross the U.S.-Mexico border.¹⁰¹ On December 27, 2022, the Supreme Court ordered a stay of the Title 42 policy during the pendency of the border crisis case review.¹⁰² Given the nature of these cases and the migrant crisis, several implicit biases may be triggered during adjudication.¹⁰³ Ethnic bias,¹⁰⁴ nationality bias,¹⁰⁵ racial bias,¹⁰⁶ socioeconomic bias,¹⁰⁷ and even political biases¹⁰⁸ may be triggered when adjudicating these matters.

⁹⁹ See generally *Obergefell*, *supra* note 100.

¹⁰⁰ Priscilla Alvarez & Tierney Sneed, *Federal Judge Blocks Title 42 Rule that Allowed Expulsion of Migrants at US-Mexico Border, Puts Order on Hold for 5 Weeks*, CNN POLITICS (Nov. 16, 2022), <https://www.cnn.com/2022/11/15/politics/title-42-migrants/index.html>.

¹⁰¹ *Id.*

¹⁰² *Arizona v. Mayorkas*, 214 L. Ed. 2d 312 (2022).

¹⁰³ See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 79.

¹⁰⁴ See Daumeyer, *supra* note 90.

¹⁰⁵ See *id.*

¹⁰⁶ *Implicit Bias*, *supra* note 58.

¹⁰⁷ Neitz, *supra* note 73.

¹⁰⁸ Posner, *supra* note 95.

Moreover, the controversial decision in *Dobbs v. Jackson Women’s Health Organization*, overruled a long-standing United States abortion precedent.¹⁰⁹ In *Dobbs*, the Supreme Court held that, “[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.”¹¹⁰ *Dobbs* addressed issues concerning women’s rights, racial disparities in abortion rates, and the politicization of abortion.¹¹¹ Given the salient issues in *Dobbs*, gender bias,¹¹² racial bias,¹¹³ and political bias¹¹⁴ could be associated with this case. Gender bias may occur because this is an issue that clearly affects women but may be decided by some male judges who unconsciously have biases against women and their right to autonomy. Political bias may also be involved because conservative citizens are typically against abortion and liberal citizens are more likely pro-choice.¹¹⁵ Thus, political leanings may implicitly fuel the adjudication of such matters.

II. THE NEUROSCIENCE OF IMPLICIT BIAS

When some judges hear the term “bias,” they may react with resistance, defensiveness, or anxiety. However, this article seeks to quell judges’ resistance to this topic by presenting implicit

¹⁰⁹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹¹⁰ *Id.* at 2284.

¹¹¹ *See generally Dobbs*, *supra* note 112.

¹¹² *See* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 79.

¹¹³ *Id.*

¹¹⁴ *See* Posner, *supra* note 95.

¹¹⁵ Hannah Hartig. Wide Partisan Gaps in Abortion Attitudes, but Opinions in Both Parties Are Complicated, PEW RESEARCH CENTER (May 6, 2022), <https://www.pewresearch.org/fact-tank/2022/05/06/wide-partisan-gaps-in-abortion-attitudes-but-opinions-in-both-parties-are-complicated/>

bias as an unconscious, utilitarian, and neuroscientific functionality. Implicit bias is a neurological process all humans possess, and it is rooted in neuroscience as much as social experience.¹¹⁶ To understand the neuroscientific basis of implicit bias, it is necessary to briefly examine the nexus between decision-making and emotion, and the neural circuitry that supplies this relationship.

Research conveys that decision-making is dependent on neural systems that regulate emotional processing.¹¹⁷ There is no singular process involved in decision-making because multiple neural circuits simultaneously operate to formulate decisions.¹¹⁸ For example, the theory of “non-linear systems analysis” posits that cognitive processes, such as judicial decision-making, simultaneously activate and coexist.¹¹⁹ Thus, the cognitive functions that charge decision-making work in concert with the cognitive modalities that inform emotions; these parallel processes interact and devise our decisions.¹²⁰ Moreover, judgments are also molded by the intersection of information and memories cognitively processed without an individual’s awareness.¹²¹ Subconscious decision-making stems from the implicit nature of memory, perception, and emotion, which subconsciously influence the configuration of decisions.¹²²

The axiom that emotion influences decision-making is illuminated by the somatic marker hypothesis, which posits that decision-making and reasoning are shaped by biological markers that

¹¹⁶ MARK F. BEAR, BARRY CONNORS, & MICHAEL PARADISO, *NEUROSCIENCE: EXPLORING THE BRAIN* 630–36 (Wolters Kluwer 4th ed. 2016).

¹¹⁷ Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1 (2018).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 23.

¹²⁰ *Id.*

¹²¹ *Id.* at 26.

¹²² *Id.*

are derived from the neural circuitry inherent in emotion.¹²³ While engaged in decision-making, a somatic marker illustrates the emotional reaction to a stimulus.¹²⁴ The non-linear analysis theory and the somatic marker hypothesis underscore the linkage of emotion in decision-making. However, emotion-fueled decision-making can be problematic because it may lead to bias.¹²⁵ The imposition of emotion in decision-making can lead judges to utilize bias in adjudication, and compromise judgments.¹²⁶ The late Justice Antonin Scalia stated, “[G]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”¹²⁷

While there is a causal link between decision-making and emotion, implicit bias is a manifestation of the emotion that is linked to decision-making.¹²⁸ Implicit bias is a means of organizing, categorizing, and simplifying the continuous stream of environmental stimuli surrounding us.¹²⁹ Implicit bias is also a safety mechanism that protects humans from potential harm.¹³⁰ Specifically, the brain detects the stimuli of another person or a group of people, and it

¹²³ Barnaby Dunn, Tim Dalgleish, & Andrew Lawrence, *The Somatic Marker Hypothesis: A Critical Evaluation*, 30 NEUROSCIENCE & BIOBEHAVIOR REV. 239 (2006).

¹²⁴ Antoine Bechara, *Human Emotions in Decision-Making: Are They Useful or Disruptive?*, in NEUROSCIENCE OF DECISION MAKING 73–95 (Oshin Vartanian & David R. Mandel eds., 2011), <https://psycnet.apa.org/record/2009-01495-003>.

¹²⁵ *Id.*

¹²⁶ Bradley, *supra* note 123, at 46.

¹²⁷ *Id.* at 4 (quoting ANTONIN SCALIA & BRYAN GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 32 (2008)).

¹²⁸ *The Neuroscience*, GEO. UNIV. NAT’L CENTER FOR CULTURAL COMPETENCE, <https://nccc.georgetown.edu/bias/module-3/4.php> (last visited Dec. 1, 2022).

¹²⁹ *Id.*

¹³⁰ *Id.*

encodes the stimuli as similar or dissimilar to the person perceiving the stimuli.¹³¹ From this encoding, an amalgamation of neural systems associates fear with “dissimilar” individuals or groups of people.¹³² When an individual is confronted with a person or group that is different from the viewer, the ventromedial prefrontal cortex is activated in the brain.¹³³ The ventromedial prefrontal cortex, located in the frontal lobe at the base of the cerebral hemisphere,¹³⁴ initiates mental states to evaluate social behavior and other social agents’ behavior.¹³⁵ When the brain encodes a person or group as being similar, it activates the dorsomedial prefrontal cortex.¹³⁶ The dorsomedial prefrontal cortex is a section of the prefrontal cortex¹³⁷ that is tasked with cognitive control and decision-making, especially decision-making that formulates social judgments.¹³⁸

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Milla Bengtsson, *What is the Ventromedial Prefrontal Cortex?*, SCI. BETA (Oct. 30, 2010), <https://sciencebeta.com/ventromedial-prefrontal-cortex/>.

¹³⁵ Mauricio Delgado, Jennifer Beer, Lesley Fellows, Scott Huettel, Michael Platt, Gregory Quirk, & Daniela Schiller, *Viewpoints: Dialogues on the Functional Role of the Ventromedial Prefrontal Cortex*, 19 NATURE NEUROSCIENCE 1545 (2016). Scientists have denoted several perspectives concerning the ventromedial prefrontal cortex. *Id.* The first perspective is termed the “social cognition perspective” because it informs the ventromedial prefrontal cortex’s role in judgment by invoking mental states to evaluate one’s social behavior, as well as the behavior of other social agents. *Id.* The other two perspectives are the “economic valuation perspective” and the “affective regulation perspective.” *Id.* “The economic valuation perspective, which focuses on the representation of the value of real and hypothetical objects and actions to inform decision making.” *Id.* The affective regulation perspective analyzes the role of the ventromedial prefrontal cortex in interpreting affective information and modifying responses based on situation circumstances. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* The medial frontal cortex is also involved in decision-making and cognition. *Id.* This brain structure regulates different cognitive functions such as monitoring conflict, detecting errors, evaluating results, reinforcing learned schemas, and making decisions. *Id.*

¹³⁸ Vinod Venkatramain, Alexandra Rosati, Adrienne Taren, & Scott Huettel, *Resolving Response, Decision, and Strategic Control: Evidence for a Functional Topography in Dorsomedial Prefrontal Cortex*, 29 J. NEUROSCI. 13158 (2009).

The brain's detection of implicit preferences corresponds with a cortical structure activation in the brain called the amygdala.¹³⁹ The amygdala is a brain structure that generates implicit bias.¹⁴⁰ To further understand the depths of implicit bias, its role, and its protective function, the amygdala must be examined.

A. IMPLICIT BIAS AND THE AMYGDALA

The amygdala is an almond-shaped structure that is situated in the temporal lobe below the cerebral cortex in the brain and is part of the limbic system, which regulates and affects emotion.¹⁴¹ Within the amygdala's structure is a conglomeration of several nuclei that provide connections to other regulatory centers of the brain including the neocortex and hippocampus.¹⁴² The amygdala is a neural structure related to implicit bias because of its role in fear and emotion.¹⁴³ "At the neural level, the magnitude of implicit preferences for in-group and against out-group correlates with the activation of the amygdala."¹⁴⁴ Specifically, synaptic transmissions within the amygdala formulate memories of emotional events.¹⁴⁵ Therefore, exposure to a perilous or painful stimuli

¹³⁹ *Brain Stuff: The Neuroscience Behind Implicit Bias*, SPECTRA DIVERSITY, Dec. 27, 2017, <https://www.spectradiversity.com/2017/12/27/unconscious-bias/>. As it pertains to implicit bias, the amygdala is where information is processed but information is also funneled through the hippocampus. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ BEAR ET. AL., *supra* note 120.

¹⁴² *Id.* at 631.

¹⁴³ *Id.* at 630.

¹⁴⁴ *The Neuroscience*, *supra* note 135.

¹⁴⁵ *Id.*

may generate learned fear that is often processed by the amygdala.¹⁴⁶ Moreover, the ventromedial prefrontal cortex helps to regulate the amygdala by mediating risk and fear.¹⁴⁷

The connection between the amygdala and its role in emotion and fear was clinically demonstrated decades ago in patients who underwent amygdalotomies where the amygdala was removed or partially destructed.¹⁴⁸ Patients whose amygdala had been fully or partially destroyed experienced less affect, fear, and aggression.¹⁴⁹ Conversely, electrical stimulation of the amygdala of study patients led to increased fear, anxiety, or vigilance.¹⁵⁰

Therefore, implicit bias is an unconscious manifestation of the learned fear that is processed and implemented by the amygdala.¹⁵¹ Implicit bias is also formed from stimuli that generate emotion.¹⁵² When a stimulus, such as a social group of people, generates fear or emotion, it activates the amygdala.¹⁵³ The amygdala's synchronous activation with emotion and fear illustrates the correlation of emotion and implicit bias.

¹⁴⁶ *Id.*

¹⁴⁷ Gregory Quirk, Gregory Russo, Jill Barron, & Kelimer Lebron, *The Role of Ventromedial Prefrontal Cortex in the Recovery of Extinguished Fear*, 20 J. NEUROSCI. 6225 (2000).

¹⁴⁸ BEAR ET. AL., *supra* note 120, at 636. Psychosurgery is no longer a common neurological intervention; psychosurgery was primarily replaced by medication.

¹⁴⁹ *Id.* at 632.

¹⁵⁰ *Id.*

¹⁵¹ William Roozeboom, *Wired for Fear: Recognizing and Countering Implicit Bias in the Brain*, 31 J. PASTORAL THEOLOGY, 110 (2021), <https://www.tandfonline.com/doi/full/10.1080/10649867.2021.1929710>.

¹⁵² *Id.*

¹⁵³ BEAR ET. AL., *supra* note 120, at 630–36.

Brain Anatomy

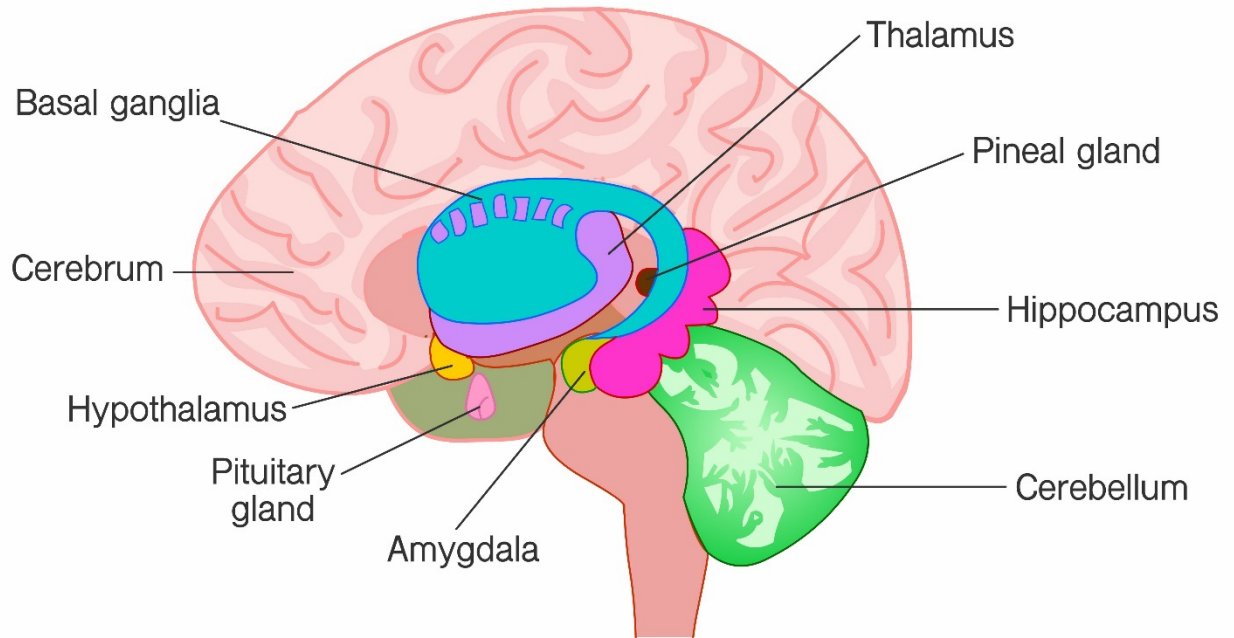


Figure 1. Diagram of the amygdala and supporting brain structures. ¹⁵⁴

III. INDIVIDUAL AND SYSTEMIC FACTORS THAT INFLUENCE IMPLICIT BIAS

Implicit bias is a functionality of the human brain that neurologically manifests in various ways.¹⁵⁵ Personal factors, such as an individual's experience, along with systemic factors, shape

¹⁵⁴ LuckySoul, *Brain anatomy. Central nervous system diagram. Head organ parts, limbic system, basal ganglia, hypothalamus, cerebellum, pineal, pituitary gland, ventricles, choroid plexus.* Vector. ADOBE STOCK, https://stock.adobe.com/images/brain-anatomy-central-nervous-system-diagram-head-organ-parts-limbic-system-basal-ganglia-hypothalamus-cerebellum-pineal-pituitary-gland-hypothalamus-ventricles-choroid-plexus-vector/381473055?prev_url=detail (last visited Dec. 20, 2022).

¹⁵⁵ Kacie Berghoef, *Implicit Bias: What It Means and How It Affects Behavior*, THOUGHTCO. (last updated June 21, 2019), <https://www.thoughtco.com/understanding-implicit-bias-4165634>. See also Bertram Gawronski, *Six Lessons for a Cogent Science of Implicit Bias and Its Criticism*, 14 *PERSP. ON PSYCH. SCI.* 1, 2 (2019), <https://www.researchgate.net/publication/329656554>. Research has indicated that individuals may be able to determine the reason for their preferences or biases. *Id.* at 2.

the variations in one’s biased thoughts and experiences.¹⁵⁶ The variations in one’s biased thoughts and experiences are shaped by personal factors, such as an individual’s experience, along with systemic factors.¹⁵⁷ Individual factors that may influence bias stem from learned associations and social conditioning,¹⁵⁸ which are often solidified through experience, observation, and teaching.¹⁵⁹ Learned associations are often taught or observed.¹⁶⁰ Teaching is one of the most common factors influencing bias, and at a young age, some people are taught stereotypes or misinformation about groups of people.¹⁶¹ Such misinformation is often taught by parents, family members, teachers, peers, or colleagues.¹⁶² Learning associations may also form by observing people or a set of circumstances associated with a social group.¹⁶³ “[W]e have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.”¹⁶⁴

¹⁵⁶ Berghoef, *supra* note 162.

¹⁵⁷ Bertram Gawronski, *Six Lessons for a Cogent Science of Implicit Bias and Its Criticism*, 14 PERSP. ON PSYCH. SCI. 1, 2 (2019), https://www.researchgate.net/publication/329656554_Six_Lessons_for_a_Cogent_Science_of_Implicit_Bias_and_Its_Criticism. Research has indicated that individuals may be able to determine the reason for their preferences or biases. *Id.* at 2.

¹⁵⁸ Berghoef, *supra* note 162.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Carolyn Stern, *Talking to Young Children about Bias and Prejudice*, ANTI-DEFAMATION LEAGUE (Oct. 30, 2012), <https://www.adl.org/resources/tools-and-strategies/talking-young-children-about-bias-and-prejudice>.

¹⁶² *Id.*

¹⁶³ Faigman et. al., *supra* note 5, at 1129.

¹⁶⁴ *Id.* at 1128.

Social conditioning often generates implicit bias through direct experience.¹⁶⁵ An experience with a group of people, especially repeated instances, can formulate the conditioning of one's thoughts and perceptions.¹⁶⁶ In reference to the role of the amygdala in emotion, discussed *supra*, note 155 and 158, an adverse interaction with a particular group of people may fuel implicit bias, especially negatively charged bias.¹⁶⁷ In a courtroom, a litigant's demeanor, personality, or behavior may trigger cognitive processing in a judge's amygdala, leading to implicit bias in decision-making. For example, the judge may unconsciously form bias against a litigant who is rude or disrespectful because the litigant's behavior elicited an emotional response.

There are also systemic factors that may elicit implicit bias by generating emotion or fear in judges.¹⁶⁸ These systemic factors pertain to the number of resources afforded to judges and the volume of the workload.¹⁶⁹

IV. ADMINISTRATIVE LAW JUDICIARY AND ITS SUSCEPTIBILITY TO BIAS

Implicit bias is a neural reality¹⁷⁰ affecting individuals, including judges.¹⁷¹ However, the administrative law judiciary may be more susceptible to implicit bias due to systemic factors that affect administrative tribunals.¹⁷² Administrative law judges are typically afforded fewer

¹⁶⁵ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J. L. & POL'Y 71, 118 (2010).

¹⁶⁶ *Id.*

¹⁶⁷ *The Neuroscience*, *supra* note 135.

¹⁶⁸ Payne, *supra* note 8.

¹⁶⁹ *Id.*

¹⁷⁰ *The Neuroscience*, *supra* note 135.

¹⁷¹ *See generally* Faigman et. al., *supra* note 5.

¹⁷² Payne, *supra* note 8.

resources in comparison with judges within the judicial branch.¹⁷³ Many administrative law judges do not have a clerk or any type of administrative assistance in the tribunal room.¹⁷⁴ Many administrative law tribunals also do not have a security officer or marshal present during an administrative proceeding.¹⁷⁵ Some hearing rooms may be small or more diminutive in comparison to courtrooms; hearings rooms may also lack the “bench” or some barrier between the administrative law judge and the parties.¹⁷⁶ The lack of administrative assistance, security personnel, and security features may generate emotion or fear.¹⁷⁷ For example, if there is no security in a tribunal room, an administrative law judge may experience heightened or anticipated fear compared to judges with assigned security. The consequent fear and emotion activate the amygdala, which generates implicit bias.¹⁷⁸

Coupled with a lack of personnel assistance, a large workload may cause an administrative law judge to feel overwhelmed, stressed, or exhausted, thus generating emotions that trigger

¹⁷³ This statement was supported at the 2022 annual conference of the National Association of Administrative Law Judiciary when conference attendees were asked about security and personnel resources in their tribunals. Dr. Cherron Payne, Commission on Human Rights and Opportunities, Presentation of Fellowship Research at the 2022 Annual Conference of the National Association of Administrative Law Judiciary (October 26, 2022). Less than ten out of eighty-five administrative law judges indicated that they had a security officer in their tribunal. *Id.* Additionally, less than seven administrative law judges indicated they had any type of personnel assistance during tribunal proceedings. *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Payne, *supra* note 8.

¹⁷⁷ BEAR ET. AL., *supra* note 120, at 630–34.

¹⁷⁸ *The Neuroscience*, *supra* note 135.

implicit bias.¹⁷⁹ The impact of an excessive workload on implicit bias is a growing concern amongst experts in the field.¹⁸⁰

The conditions under which immigration judges currently operate reduce their cognitive capacity, making it more likely that implicit biases will drive their decisions. Specifically, their extraordinarily high caseload means that they have little time to think before assuming issuing oral decisions into a tape recorder, and they are often overwhelmed and exhausted. Studies have also shown that stereotypes have a stronger impact on judgments when they are made under time pressure. Indeed, “systematic changes of cognitive process” occur when people make decisions under time pressure.¹⁸¹

A large caseload amplifies stress when there is minimal or no administrative assistance during tribunal hearings.¹⁸² “Decision making under time stress is actually decision making with limited resources.”¹⁸³ During tribunal hearings, the lack of assistance may also cause frustration, confusion, and nervousness, which may generate emotion and initiate bias.

Additionally, a Connecticut case study of the lived experiences of judges illustrates the correlation between diminished resources and implicit bias.¹⁸⁴ In 2019, a qualitative study of several Connecticut judges was conducted concerning their working conditions.¹⁸⁵ The judges were either interviewed or given written questionnaires¹⁸⁶ to complete regarding systemic factors,

¹⁷⁹ Fatma Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Payne, *supra* note 8.

¹⁸³ *Id.* Marouf, *supra* note 186 at 431 n.82.

¹⁸⁴ *See generally* Payne, *supra* note 8.

¹⁸⁵ Payne, *supra* note 8.

¹⁸⁶ The data for this study was collected utilizing questionnaires, an interview, and courtroom observations. *Id.* at 78.

such as safety in the courtroom, working conditions, and workload.¹⁸⁷ The participant pool included magistrates and judges from the superior court and the administrative law judiciary.¹⁸⁸ The data and results indicated that most of the study participants felt that reduced security in the courtroom or tribunal made the judges feel less secure and impaired their ability to adjudicate.¹⁸⁹ A study participant stated, “[t]he lack of personnel in the courtroom presents safety challenges because there are no personnel to assist with safety issues or the appearance of security organization.”¹⁹⁰ Another judge recalled that a trial was truncated because the litigants were “agitated or in a litigious mood.” Another respondent noted that she rushed a trial because of the parties’ aggressive and menacing behavior.¹⁹¹

Moreover, a third of the study participants indicated on their questionnaires that decreased resources fostered bias in adjudicatory proceedings.¹⁹²

Furthermore, the Connecticut study revealed that eight out of nine study participants experienced some type of impairment in the ability to adjudicate due to safety concerns or insufficient resources, such as the absence of a clerk in the courtroom or tribunal.¹⁹³ One participant declared, “[d]oing a clerk’s job and running the court seems to distract from the

¹⁸⁷ *Id.* at 80.

¹⁸⁸ *Id.* at 81–82.

¹⁸⁹ *Id.* at 148.

¹⁹⁰ *Id.* at 106.

¹⁹¹ *Id.*

¹⁹² *Id.* at 143.

¹⁹³ *Id.*

litigants. This is unfair to both parties.”¹⁹⁴ The lack of a clerk in the courtroom or tribunal exacerbated the issue of heavy workloads.¹⁹⁵ Some of the judges indicated that they had extensive dockets with insufficient time to complete the work.¹⁹⁶

The Connecticut case study illustrates the correlation between courtroom concerns and enhanced fear and emotion, which the amygdala translates into implicit bias.¹⁹⁷ Data and personal accounts from this study demonstrate that safety concerns, diminished personnel assistance, and extensive workloads in the administrative law judiciary triggers the amygdala’s cognitive process to generate bias in the adjudicative process.¹⁹⁸

V. MITIGATING BIAS IN THE ADMINISTRATIVE LAW JUDICIARY

With fewer resources apportioned to administrative tribunals in comparison to courts within the judicial branch, the administrative law judiciary may be more likely to exhibit implicit bias during proceedings and in adjudication.¹⁹⁹ However, scholars have researched and documented viable ways for judges to prevent and counteract the application of bias in adjudicatory matters. Jerry Kang, a UCLA professor of law and UCLA’s first vice chancellor for equity, diversity, and inclusion, is a leading researcher on the issues concerning judges and bias.²⁰⁰ Professor Kang has also collaborated with other scholars and judges to develop ways to effectively

¹⁹⁴ *Id.* at 105.

¹⁹⁵ *Id.* at 148.

¹⁹⁶ *Id.* at 152. One of the study participants indicated that he would rush or truncate trials because he had a lengthy docket and inadequate time to finish. *Id.*

¹⁹⁷ *See generally* Payne, *supra* note 8.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See generally* Kang, *supra* note 68.

mitigate bias.²⁰¹ Kang’s conceptual approach to mitigating bias requires four basic steps: (1) deflate, (2) debias, (3) defend, and (4) data.²⁰² This paradigm, the “4-D approach,” sets forth the foundation for developing specific practices to mitigate bias.

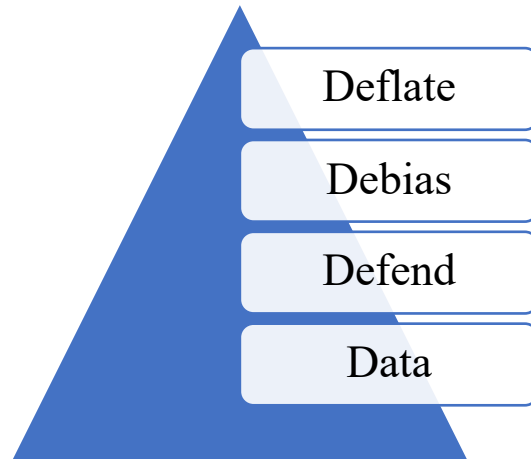


Figure 2. The 4-D Approach to Mitigating Bias

A. DEFLATE

The first step in the 4-D approach is to “deflate.”²⁰³ Specifically, Kang recommends that judges deflate their egos and accept their faults as an initial step to mitigate bias.²⁰⁴ In essence, judges should acknowledge their susceptibility to implicit bias and the reality that bias has been applied in their past decision-making. Deflating one’s ego is a crucial first step because it compels a judge to be cognizant of their own vulnerability and susceptibility to implicit bias. Kang noted that “explicitly noticing the potential for bias is the best way to conquer it.”²⁰⁵ Judges should also

²⁰¹ Faigman et. al., *supra* note 5, at 1127.

²⁰² Kang, *supra* note 68, at 81.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 86.

take an implicit bias assessment. The Implicit Association Test is offered online and is free to access.²⁰⁶

Another mode of deflating is to take an implicit bias course or training.²⁰⁷ Recently, government agencies expanded implicit bias training due to the increased bias awareness.²⁰⁸ For instance, the U.S. Justice Department required its law enforcement officers and prosecutors to undergo implicit bias training, mandated by Deputy Attorney General Sally Q. Yates.²⁰⁹ When speaking of the need for implicit bias at the federal level, Attorney General Yates explained, “[w]hat the science also shows is that the most important aspect of countering implicit bias is being aware that you have it to begin with.”²¹⁰ Therefore, judges should take an implicit bias course, engage in bias training, or teach an implicit bias course for continuing legal education credits.²¹¹

B. DEBIAS

“Debias,” the second step in the 4-D approach, refers to removing biased or stereotyped images from a judge’s environment.²¹² The avoidance of specific activities, such as biased media,

²⁰⁶ *The Implicit Association Test*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/education.html>, (last visited Oct. 22, 2022). See also Anthony Greenwald, Eric Uhlmann, T. Andrew Poehlman & Mahzarin Banaji, *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCH. 17, 17-18 (2009).

²⁰⁷ Joe Davidson, *Implicit Bias Training Seeks to Counter Hidden Prejudice in Law Enforcement*, WASH. POST (Aug. 16, 2016, 7:00 AM), <https://www.washingtonpost.com/news/powerpost/wp/2016/08/16/implicit-bias-training-seeks-to-counter-hidden-prejudice-in-law-enforcement/>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Davidson, *supra* note 225.

²¹¹ Little, *supra* note 62.

²¹² Kang, *supra* note 68, at 82.

biased activities, and some political activities, is also recommended by Professor Kang.²¹³

Debiasing strategies include disseminating accurate data regarding targeted social groups, or avoiding specific activities liked biased media, biased activities, and some political activities.²¹⁴

Debiasing not only removes negative stimuli from a judge's environment, but it also infuses positive imagery into one's environment. For instance, judges can inject counter-stereotypical images into their environment, such as positive images of leaders and achievers from minority groups or social groups who are often targeted by bias.²¹⁵ Kang suggests displaying positive imagery in one's office or home.²¹⁶ Judges should also proactively attempt to engage in social or professional settings with a diverse group of people, especially those from minority backgrounds.²¹⁷ For example, the American Bar Association fostered debiasing by encouraging entities responsible for continuing legal education to incorporate diversity and inclusion into the curriculum.²¹⁸

²¹³ *Id.* at 82–83.

²¹⁴ *Id.*

²¹⁵ Kang, *supra* note 68, at 82–83. Studies indicate that exposure to positive imagery of minority or targeted social groups decreased the implicit bias scores on assessments such as the Implicit Association Test. *Id.* at 82.

²¹⁶ *Id.* at 82.

²¹⁷ Little, *supra* note 62.

²¹⁸ *Id.* To further illustrate the impact of debiasing and social interaction, Professor Kang cited a study of female college students who attended co-educational institutions, as opposed to female students who attended women's institutions. Citation. The students who attended women's institutions had a lower gender bias score on implicit bias assessments in comparison to the students who attended co-educational institutions. Kang, *supra* note 68, at 82.

C. DEFEND

The third step is to “defend,” which pertains to developing modes or methodologies that prevent or lessen bias, such as removing social, racial, or other identifying information from files.²¹⁹ A judge should defend against implicit bias by proactively instituting measures that will prevent bias and serve as a reminder to contemplate potential biases in a decision.²²⁰ Kang also suggests that prior to entering a decision, judges should shift their perspective and put themselves in the place of the litigant.²²¹

Specifically, judges should make a checklist or rubric to help guide decision-making²²² and develop the criteria before reviewing case-specific information.²²³ The judge may elect which elements are included in the rubric or checklist, such as the evidence weight, fact consistency, testimony correlation, and other such factors.²²⁴ Before entering a decision, the judge should review the decision to make sure that it aligns with the rubric and that any deviation from the rubric or checklist is not due to implicit bias.²²⁵ A judge should also examine the decision to determine if it would have been decided differently if the litigant were not from a targeted social group.²²⁶

²¹⁹ Kang, *supra* note 68, at 83.

²²⁰ *Id.* at 83–88.

²²¹ *Id.* at 87–88.

²²² *Id.* at 85.

²²³ Casey et. al., *supra* note 6, at 68.

²²⁴ Kang, *supra* note 68, at 85–86.

²²⁵ *Id.* at 85.

²²⁶ *Id.* at 85–86. The literature also suggests employing diverse decision-making teams to garner a spectrum of thought from an array of judges. *Id.* at 88. This approach may be attainable for judges in the judicial branch but is not often feasible or possible for administrative law judges due to agency structures

To foster more insightful thinking, scholars suggest the usage of procedures to support decision-making, such as taking notes, using bench cards, and writing the reasons for a judgment.²²⁷

Judges should also apportion ample time for decision-making; extra time will allow judges to avoid stress while adjudicating, but also allow judges time to ensure that bias does not underpin their decision.²²⁸ Apportioning ample time for adjudication is also imperative because it gives judges time to remind themselves to deliberate carefully.²²⁹ Judges should not adjudicate when emotional, stressed, or fatigued because it can elicit implicit bias.²³⁰ For example, a study found that participants utilized negative stereotypes about a defendant's guilt when the study participants were under pressure or experiencing a high cognitive load.²³¹

Another tactic to defend against bias is cloaking.²³² Cloaking involves (1) concealing social category information while making a tentative decision and (2) uncloaking the information to check for unintended consequences.²³³ Some administrative law judges may not be able to engage in cloaking, but it may be helpful to remove as much social category information as

and less resources. *Id.* However, administrative law judges could participate on panels, committees, and task forces to enhance diversity and combat implicit bias. *Id.*

²²⁷ Casey et. al., *supra* note 6, at 67.

²²⁸ Kang, *supra* note 68, at 85–86. *See also* Casey et. al., *supra* note 6, at 67.

²²⁹ Casey et. al., *supra* note 6, at 67.

²³⁰ Kang, *supra* note 68, at 84–85.

²³¹ Ad Van Knippenberg, Ap Dijksterhuis, & Diane Vermeulen, *Judgment and Memory of a Criminal Act: The Effects of Stereotypes and Cognitive Load*, 29 EUR. J. SOC. PSYCH. 191, 191 (1999).

²³² Kang, *supra* note 68, at 83–84.

²³³ *Id.* at 83–84, 90.

possible, and then check to ensure the preliminary decision does not deviate from the judge’s rubric due to bias.

There are also systemic ways to defend against bias.²³⁴ As part of the National Center for State Courts’ implicit bias and judicial education project, researchers proposed several ways to defend against bias from a systemic perspective.²³⁵ Researchers proposed that courts and tribunals assist judges by adjusting court schedules and calendars to afford judges ample time to make deliberative decisions.²³⁶ Courts and tribunals should also develop guidelines and protocols for judges to check for implicit bias in their decisions, as well as provide periodic educational workshops and diversity trainings.²³⁷ Researchers also suggested that courts and tribunals “[d]evelop protocols that identify potential sources of ambiguity; consider the pros (e.g., more

²³⁴ Neitz, *supra* note 73, discusses the issue of mitigating the socioeconomic bias of judges by proposing an amendment to Rule 2.3 of the ABA Model Code of Judicial Conduct. *Id.* at 162–63.. The amendment would interject a specific type of bias rather than a generalized term, which would hopefully assist judges’ awareness of the subsets of bias. *Id.* at 162. The amendment would specifically mention socioeconomic bias in addition to the Code’s general mention of bias. *Id.* The proposed amendment to Rule 2.3(b) is as follows: “A judge shall pay particular attention to avoid bias or prejudice on the basis of a litigant’s socioeconomic status.” *Id.*

There have been other proposed amendments to enhance the language in the Model Code of Judicial Conduct by specifically referring to implicit bias, instead of a generalized reference to bias. *Id.* at 163. The proposed amendment would state the following:

(1) Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice. (2) A judge should take part in activities designed to uncover subconscious bias and to learn as much about how to understand the role of such bias in decision-making. Each judge must be diligent to a process of self-examination to minimize the impact of personal bias in the administration of justice.

Id. The proposed amendments have not been accepted by the American Bar Association, but increased awareness of implicit bias may encourage future additions to the Model Code of Judicial Conduct. *Id.* Moreover, the absence of such language in the Model Code furthers the need for implicit bias trainings as well as other methods to mitigate bias. *Id.* at 163–65.

²³⁵ Casey et. al., *supra* note 6, at 66.

²³⁶ *Id.* at 67.

²³⁷ *Id.* at 66–67.

understanding of issues) and cons (e.g., familiarity may lead to less deliberative processing) of using judges with special expertise to handle cases with greater ambiguity.”²³⁸

D. DATA

The last step in the 4-D approach is “data,” which involves amassing data regarding past decisions.²³⁹ Judges should review a collection of past decisions over a certain period, such as several months, to discern whether there are trends toward bias in their adjudication.²⁴⁰

Systemically, courts and tribunals should develop a task force or panel to review judges’ decisions to check for trends of bias in adjudication, as well as implement practical ways to assist judges in mitigating such biases.²⁴¹

CONCLUSION

As custodians of justice, judges must work to ensure impartiality and fairness by developing and implementing effective ways to mitigate bias. Specifically, the administrative law judiciary must be cognizant of its susceptibility to bias due to resource limitations that are pertinent to the administrative tribunal, while diligently working to counteract implicit bias.²⁴²

However, bias is not a concern that is solely germane to the administrative law judiciary. All judges should be aware of bias and work to prevent it. To effectuate this change, it is recommended that judges initially take the Implicit Association Test or a similar assessment, to gauge their individual biases. After personal biases have been identified, it is imperative that all

²³⁸ *Id.* at 68.

²³⁹ Kang, *supra* note 68, at 88.

²⁴⁰ *Id.*

²⁴¹ Casey et. al., *supra* note 6, at 68.

²⁴² *See generally* Kang, *supra* note 68.

judges undergo bias training. Specifically, annual bias training should be mandated as a requirement to serve as judges. National judicial organizations and councils should work with state and federal judiciaries to mandate annual bias training or certification. After undergoing training, judges should test recommended mitigation techniques and adopt a methodology that effectively works for them.

Mandated bias training is particularly important to the administrative law judiciary because this cadre of judges is deemed as the face of the government. Administrative law judges render decisions and formulate administrative precedents that affect a spectrum of legal areas, a diversity of people, and a volume of pro se parties. As the face of the government, the administrative law judiciary must work to be a paragon of justice and the frontispiece for eradicating implicit bias in legal proceedings. Administrative law judges must exhibit focus, willingness, and even courage to combat bias and safeguard the administrative process's integrity. Mitigating bias and promulgating fairness and impartiality will ensure that all cases matter.